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No. 91-1419

Supreme Court, U.S.
FILED
APR 8 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

GUAM HAKUBOTAN, INC.,

Petitioner,

v.

FURUSAWA INVESTMENT CORPORATION, JULALE INVESTMENT CORPORATION, and YASUDA SHOJI KK,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's conclusion that substantial evidence does not support the judgment reached by the lower courts constitutes de novo review of Guam law, or impermissible fact-finding.

2. Whether petitioner waived the right to challenge the de novo standard of review adopted in *Guam v. Yang*, 850 F.2d 507 (9th Cir. 1988), when petitioner failed to raise that issue either in its court of appeals brief, or its petition for rehearing and suggestion for rehearing en banc.

3. If petitioner preserved the right to challenge the de novo standard of review, whether the Ninth Circuit must defer to a federal District Court's interpretation of Guam statutory law.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The present case involves a dispute between the petitioner, Guam Hakubotan, Inc., and the respondents, Furusawa Investment Corporation, Julale Investment Corporation, and Yasuda Shoji KK, over title to property in Guam.[1] The parties' rights are governed by Guam Civil Code section 2889 (1970), which creates rules for contracts between mortgagors and mortgagees. Guam Civil Code section 2889 was copied verbatim from California

[1] None of the respondents has a parent or subsidiary company. Sup. Ct. R. 29.1

Civil Code section 2889 (West 1974) (enacted 1872) in 1933. Local Guam courts have uniformly and without exception ruled that California court decisions predating enactment of the Guam Civil Code in 1933 govern the interpretation of identical provisions of the Guam Civil Code, and that subsequent California decisions are persuasive.

In accordance with this accepted rule of statutory construction, both parties throughout this litigation have relied on California case authority to support their respective interpretations of Guam Civil Code section 2889. The Guam Superior Court and the District Court of Guam, appellate division, applied the same California case law in analyzing the parties' rights.

The Court of Appeals for the Ninth Circuit agreed with the lower courts that California court decisions prior to 1933 constitute binding precedent with respect to the proper interpretation of Guam Civil Code section 2889. The Ninth Circuit concluded, however, that the lower courts misapplied the California decisions on which they purported to rely, and that properly read, those decisions established, as a matter of law, that judgment should have been entered in favor of respondents. The Ninth Circuit's interpretation of California case law was correct. To the extent Hakubotan merely disagrees with that interpretation, Hakubotan does not raise an issue which warrants this Court's review.

There is no merit to Hakubotan's contention that a writ of certiorari should be granted to review the de novo standard of review the Ninth Circuit adopted in *Guam v. Yang*, 850 F.2d 507 (9th Cir. 1988). First, Hakubotan did

not raise that issue below; second, the Ninth Circuit did not apply a de novo standard of review in this case – it simply concluded the judgment was not supported by the record; and third, there is no merit to Hakubotan's contention that *De Castro v. Board of Comm'rs*, 322 U.S. 451, 455 (1944), requires the Ninth Circuit to defer to a federal District Court judge's interpretation of California case law. *De Castro* requires deference to local appellate courts, and as yet no such courts exist in Guam.

The fact-dependent nature of the issues raised in this case, and that the Ninth Circuit did not purport to tell Guam courts how to construe their laws, are made clear from a brief review of the facts. Petitioner, Hakubotan, a real estate speculator, purchased an undeveloped piece of property in Guam for a total price of $1,895,000. Hakubotan invested $20,000 of its own funds in the property. To finance the remaining $380,000 down payment and raise money for other purposes, Hakubotan borrowed from respondent Yasuda 170 million yen (then equivalent to $654,000) at an interest rate of 1.5% per month, with the principal due in one year. Yasuda's loan was secured by a junior mortgage on the newly purchased property. The mortgage gave Yasuda the right to initiate either judicial or non-judicial foreclosure proceedings in the event Hakubotan defaulted on the one-year loan.

Less than one month before the principal was due, Hakubotan informed Yasuda it would have difficulty repaying the principal and requested a six-month extension of the loan. Yasuda initially declined, warning Hakubotan it would initiate foreclosure proceedings in the event of a default. Following extensive negotiations, Hakubotan eventually persuaded Yasuda to grant the

extension. Hakubotan accomplished this by proposing a *new contract* under which Hakubotan would agree to transfer its interest in the mortgaged property to Yasuda's designee (respondent Furusawa) without the necessity of a formal foreclosure if Hakubotan failed to repay the loan at the end of the six-month extension.

The parties jointly retained Guam counsel to draw up the contract implementing Hakubotan's proposal. Hakubotan also consulted with its own separate attorney before signing the contract. The contract which the parties then signed granted Hakubotan six additional months to repay its loan. The contract further provided that "For and in consideration of the extension of time given by the Mortgagee [Yasuda] to the Mortgagor [Hakubotan]," Hakubotan would immediately execute a warranty deed in favor of Yasuda's designee, Furusawa. In the event of a default during the extension period,

> then and in such event, Furusawa is hereby authorized and empowered by Mortgagor to record the Warranty Deed conveying all right, title and interest of Mortgagor to Furusawa Investment Corporation completely, in which event, the obligation of Mortgagor to Mortgagee under the mortgage secured by promissory note requiring payment of One Hundred Seventy Million Yen and interest payable in currency of Japan is canceled and all matter resolved and settled with ownership of all properties listed in Mortgage being in the complete ownership of the Mortgagee.[2]

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[2] Petitioner asserts Furusawa "*claimed* to be authorized to record the deed in the event that Hakubotan defaulted during

(Continued on following page)

The contract further provided that if and when Hakubotan defaulted and the deed was recorded, the transaction

> shall be interpreted to be a sale of all [Hakubotan's] interest in all the properties listed in the Mortgage . . . and there shall be no rights of redemption or any other rights whatsoever remaining in [Hakubotan].[3]

At such time,

> whatever rights that [Hakubotan] had in the properties described in said Warranty Deed shall cease and all right, title and interest completely belong to Furusawa Investment Corporation . . . .

During the six-month extension, the original promissory note and mortgage remained in full force, and Hakubotan continued to own the mortgaged property. When Hakubotan defaulted at the end of the six-month extension, Furusawa recorded the deed and became owner in fee simple of the property.

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the extension period." Petn. at 5 (emphasis added). This is not something Furusawa "claims." It is a provision of the contract which the parties signed.

[3] The term "right of redemption" (synonymous with the term "equity of redemption") refers to a mortgagor-debtor's right, after defaulting on a debt but before its encumbered property is sold at a foreclosure sale, to regain title to the property by paying off the debt, plus costs and damages. 1 Harry D. Miller & Marvin B. Starr, California Real Estate § 9:142, at 464-65 (2d ed. 1989); Guam Civ. Code §§ 2903, 2905 (1970).

Hakubotan filed the present action in the Superior Court of Guam against Yasuda, Furusawa, and a related company known as Julale Investment Company. Hakubotan asked the court to declare that the conditional sales transaction which Hakubotan had itself proposed was in reality just a "disguised" mortgage to secure repayment of the original 170 million yen loan. Hakubotan asserted Furusawa could not obtain title to the mortgaged property without initiating the very type of foreclosure proceedings that would have been required had there been no extension contract. Hakubotan based its arguments on Guam Civil Code section 2889, which prohibits "contracts in restraint of the right of redemption from a lien . . . ." The Guam superior court, sitting without a jury and purporting to apply California law, agreed with Hakubotan's argument. While the court accepted the rule that a mortgagor-debtor has a right to sell his mortgaged property to the mortgagee-creditor in exchange for extinguishment of the underlying debt, the court concluded that the warranty deed in this case was nothing more than a disguised security device, that the deed was void, and that Hakubotan retained its equitable right of redemption. A three-judge panel of the District Court of Guam, sitting as an appellate division, found no error in the superior court's decision and affirmed.[4]

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[4] The District Court's opinion, to which Hakubotan claims great deference is owed because it supposedly has a better understanding of the unique laws and customs of Guam than does the Ninth Circuit, was authored by Judge Alan McDonald, United States District Court for the Eastern District of Washington, sitting by designation.

Although it reversed, the Ninth Circuit made clear it agreed with each of the principles of law upon which the lower courts based their decisions. Specifically, it agreed with the following legal principles: (1) though Guam Civil Code Section 2889 prohibits a mortgagor surrendering his right of redemption when he enters into a mortgage agreement, it does not prevent a mortgagor-debtor selling his mortgaged property to the mortgagee-creditor in a transaction subsequent to and independent of the initial mortgage transaction (App. A at 6a; *Watson v. Edwards*, 38 P. 527, 529 (1894) (" 'the mortgagee may always purchase the mortgagor's right of redemption, and thus acquire an absolute title' "))[5]; (2) a mortgagor may *conditionally* sell his property, the condition being that rights in the property will transfer to the mortgagee only in the event the mortgagor defaults on his obligation within an agreed extension period (App. A at 11a)[6]; and (3) trial courts must carefully scrutinize the transaction to ensure that what purports to be a sale is not really a disguised security transaction, and that what purports to be a deed is not really a disguised mortgage (App. A at 7a)[7].

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[5] The trial court and the Appellate Division cited *Watson v. Edwards* for the same proposition. App. B at 17a; App. C at 26a.

[6] The Ninth Circuit and the trial court relied on the same case authority to support this proposition. App. A at 11a; App. C at 30-32a.

[7] The Ninth Circuit and the trial court each relied on *Beeler v. American Trust Co.*, 147 P.2d 583 (1944), to support this proposition. App. A at 10a; App. C. at 33a-34a.

In scrutinizing sales transactions between mortgagors and mortgagees, the Ninth Circuit also agreed with the lower courts that it is appropriate for the trier of fact to focus on those features of the transaction which are inconsistent with a true sale having occurred, including: (1) whether the "seller" continues to spend money on the care and upkeep of the property after title has changed hands; (2) whether following the transfer of title the "seller" leases the property back for rent payments roughly equal to his prior interest payments; (3) whether the cost of reacquiring title to the property was approximately equal to the "seller's" prior debt; (4) whether the value of the property greatly exceeds the value of the "seller's" debt. App. A at 10a; App. B at 18a; App. C at 35a.

While the Ninth Circuit agreed with each of the above principles of law, it concluded they were misapplied by the lower courts. The Court of Appeals agreed with respondents that without exception, the only cases in which factual questions have been raised about whether the parties intended to engage in a true sale are cases where a mortgagor-debtor transfered title to his mortgagee-creditor, but retained the right for a limited period of time *after* title changed hands to reacquire the property. App. A at 10a; *cf.* Appellants' Opening Brief at 30-34; Appellants' Reply Brief at 11-17. In cases of this type, the question naturally arises whether the "seller" truly intended to convey his property to the buyer, or whether the sale was meant to be temporary, with title changing hands only to insure that the "seller" paid the agreed price to get his property back. If the trier of fact concludes title changed hands simply to induce the

"seller" to pay money to get the property back, then the deed *by definition* functions as a mortgage, and the original owner is entitled to the full protection of a mortgagor. Guam Civ. Code § 2924 (1970) (a mortgage is a "transfer of an interest in property, made only as a security for the performance of another act . . . ").

Here, the Ninth Circuit concluded there were no factual issues about the parties' intentions for the trial court to resolve. The parties' contract stipulated title to the mortgaged property would not change hands unless and until Hakubotan defaulted on its loan during the six-month loan extension. However, if and when title changed hands, there was no provision for Hakubotan to get the property back. Since Hakubotan did not have the option to reacquire the property after the deed took effect, the deed *by definition* gave rise to a permanent conveyance, not a temporary security device. As the Ninth Circuit observed, the recording of the deed "transferred the property to Furusawa Investment with finality." App. A at 9a.

By the same token, the Ninth Circuit reasoned the deed could not be characterized as a mortgage because it lacked the one essential characteristic all mortgages share: it did not secure the repayment of a debt.

> The essential factor the court must consider in scrutinizing a deed is whether the debt or debtor-creditor relationship effectively continues *after the conveyance. Beeler [v. American Trust Co.*, 147 P.2d 583, 594, 24 Cal.2d 1 (1944)]; *Holmes v. Warren*, 78 P. 954, 956, 145 Cal. 457 (1904) ("[T]he test in all this class of cases is,

> was there a subsisting debt after the conveyance?"); *Montgomery v. Spect*, 55 Cal. 352, 354 (1880) ("The only inquiry . . . is, whether the relation of debtor and creditor remains, and a debt still subsists between the parties."). In the present case, the conveyance did not occur until the deed was recorded; at that point, ownership of the property transferred to Furusawa Investment and Hakubotan's debt was cancelled. *The debtor-creditor relationship ended with the conveyance.*

App. A at 9a (emphasis added). Since the parties' contract stated in unambiguous terms that the creditor-debtor relationship terminated when the deed took effect, "the evidence does not support the lower courts' view that the agreement and warranty deed constituted a mortgage." App. A at 8a.

The Ninth Circuit reversed with directions to enter judgment for Yasuda and the other respondents. Hakubotan's subsequent petition for rehearing and suggestion for rehearing en banc was denied. Not one judge in the Ninth Circuit voted to rehear the case en banc.

REASONS WHY THE PETITION SHOULD BE DENIED.

1. Hakubotan Waived The Right To Challenge The Standard Of Review Adopted By The Ninth Circuit In *Guam v. Yang* By Failing To Raise That Issue Below.

This Court has stated that as a general rule, absent exceptional circumstances, it will not entertain issues which have not been raised below. *Brandon v. Holt*, 469 U.S. 464, 473 n.24 (1985); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Hakubotan did not argue below that the Court of Appeals improperly engaged in de novo review of the lower court decisions. Indeed, it took a position directly opposite to that view. In its court of appeals brief, Hakubotan affirmatively stated that to the extent Yasuda's appeal raised pure issues of law about the meaning of Guam statutes, "the proper standard of review is 'de novo.' " Appellee's Brief at 10. Furthermore, in construing Guam law, Hakubotan urged the Ninth Circuit to rely exclusively on California precedent. *Id.* at 15-26. That is precisely what the Ninth Circuit did.[8]

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[8] Hakubotan's reliance on *Guam v. Ibanez*, 880 F.2d 108 (9th Cir. 1990) to support the contention it was foreclosed from challenging the *Yang* de novo review rule before a three-judge panel of the Ninth Circuit is without merit. In *Ibanez*, the Court of Appeals ruled it was bound by *Yang*. The Ninth Circuit stated it would be no less bound if *Yang* had been decided by a

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Hakubotan's contention that it challenged the Ninth Circuit's de novo standard of review in its petition for rehearing and suggestion for rehearing en banc is without merit. The thrust of Hakubotan's argument in its petition for writ of certiorari is that *Guam v. Yang* conflicts with *De Castro v. Board of Comm'rs*. Neither of those cases was even cited in Hakubotan's rehearing petition. The petition for rehearing was instead limited to the following arguments: (1) that the Court of Appeals misread the California decisions on which it relied; (2) that the court ignored other California decisions which allegedly support Hakubotan's contention the deed was really a disguised mortgage; (3) that the Ninth Circuit second-guessed the trial court's findings of fact.

Furthermore, in its motion to stay issuance of the mandate, Hakubotan stated the sole issue it intended to raise in its petition for writ of certiorari was that the Court of Appeals "improperly and unlawfully substituted its judgment for the Superior Court of Guam's factual determination that the parties intended the transaction as a mortgage and not an absolute conveyance." Petn. for Stay at 1-2.

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three-judge panel. However, the Court of Appeals did not rule plaintiff was precluded from challenging *Yang* if plaintiff wished to preserve the issue for Supreme Court review. In *Ibanez*, the plaintiff did file a petition for certiorari, raising as one of its questions presented that it was "error for the Ninth Circuit not to defer to Guam interpretation of Guam laws." *Guam v. Ibanez*, 880 F.2d 108 (9th Cir. 1990), *cert. denied*, 58 U.S.L.W. 3773 (U.S. Jun. 3, 1990) (No. 89-1609).

The de novo review issue did not surface until Hakubotan retained new counsel to draft its certiorari petition, and is accordingly waived. As we now demonstrate, the issue in any event is a red herring.

2. Because The Ninth Circuit Did Not In Fact Apply A De Novo Standard Of Review, The Question Whether *Guam v. Yang* Was Correctly Decided Is Not Presented In This Case.

Hakubotan has artfully framed its petition as a challenge to the Ninth Circuit's decision in *Guam v. Yang* to review interpretations of Guam law under a de novo standard of review. But in this case the Ninth Circuit did not engage in de novo review of Guam law. It construed Guam Civil Code section 2889 exactly the same way Guam courts have construed it.

Guam courts have consistently ruled that where Guam has enacted the same statutes as California, it is presumed the statutes were intended to have the same significance and scope as they were given by California courts prior to their enactment, and that subsequent California cases, while not binding with respect to the meaning of such statutes, are nevertheless persuasive. *Agat Boat Shop v. Asan Blasting Co.*, 1 Guam R. 615, 616-17 (1979); *Y Aleman Corp. v. Chase Manhattan Bank*, 414 F. Supp. 93, 94 (D. Guam 1975); *Atoigue Gogo v. Cruz Ada*, 128 F. Supp. 92, 94 (D. Guam App. Div. 1955); *Brandt v. United States*, 110 F. Supp. 627, 630 (D. Guam 1953). A comparable rule of construction is accepted in all jurisdictions, and has been endorsed by this Court and other courts as the proper approach for construing federal,

state, as well as territorial laws adopted from other jurisdictions.[9]

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[9] *See, e.g., Robinson v. Belt*, 187 U.S. 41, 47 (1902) ("In adopting this law with respect to assignments, the courts of the Indian territory are also bound to respect the decisions of the supreme court of Arkansas in interpreting that law."); *Capital Traction Co. v. Hof.*, 174 U.S. 1, 36 (1899) ("By a familiar canon of interpretation, heretofore applied by this court whenever congress, in legislating for the District of Columbia, has borrowed from the statutes of a state provisions which had received in that state a known and settled construction before their enactment by congress, that construction must be deemed to have been adopted by congress together with the text which is expounded, and the provisions must be construed as they were understood at the time in the state."); *Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295, 307 (1898) (where federal law modeled on Massachusetts law, "the known and settled construction which those statutes had received in Massachusetts before the original enactment of the act of congress, must be considered as having been adopted by congress with the text thus expounded"); *Tucker v. Oxley*, 9 U.S. (5 Cranch) 34, 42 (1809); *Paiewonsky v. Paiewonsky*, 315 F. Supp. 752, 757 (D.V.I. 1970), *aff'd*, 446 F.2d 178 (3d Cir. 1971), *cert. denied*, 405 U.S. 919 (1973) (Virgin Islands courts defer to construction of identical law adopted by courts of Alaska); *Ortiz de Fuentes v. Corporacion Insular de Seguros*, 699 F. Supp. 360, 364 (D.P.R. 1988) (Puerto Rican Supreme Court defers to construction of courts in jurisdiction from which law adopted); Sutherland Statutory Construction (5th ed. 1991) § 52.02, pp. 201-206, n.1. *See also United States v. Johnson*, 181 F.2d 577, 580 n.3 (9th Cir. 1950), citing Congressional testimony by the Navy Captain who compiled and codified the Guam code, indicating California statutes were adopted for Guam so that Guam judges and attorneys would have the "benefit of California Code Annotations and Law Digests and a reference to interpretations by other courts."

The Ninth Circuit followed this rule and agreed it was bound by California decisional law; it then relied exclusively on such law in resolving this case. Quoting the California Supreme Court decision in *Beeler v. American Trust Co.*, 147 P.2d 583 (1944), which both the Guam trial court and Hakubotan cited as setting forth the governing rule, the Ninth Circuit correctly observed that under California (and therefore Guam) law, the "essential factor" (App. A at 9a) a court must consider in determining whether a deed operates as a mortgage " 'is whether the relation of debtor and creditor continues so that there is a subsisting debt *after* the conveyance.' " App. A at 7a (alteration in original) (quoting *Beeler*, 147 P.2d at 594.)[10] The Ninth Circuit concluded that since there was no evidence in the record that the creditor-debtor relationship between Hakubotan and Yasuda continued to exist after the subject property was conveyed to Furusawa, it followed that the deed could not properly be characterized as a mortgage.

In reaching its conclusion, the Ninth Circuit did not announce any new principles of law. It applied existing legal principles which all Guam courts agree are controlling, and concluded that in light of those principles, there

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[10] The Ninth Circuit cited pre-1933 California cases for this same proposition. *See* App. A at 9a. In its petition, Hakubotan does not disagree with this principle of law. Indeed, while Hakubotan claims the Ninth Circuit impermissibly interfered with the Guam courts' construction of Guam law, it fails to articulate what principle of Guam law the Ninth Circuit violated. Hakubotan simply disagrees with the result the Ninth Circuit reached. In effect, Hakubotan would have a rule that Appellate Division decisions are immune from review.

was simply no evidence to support the conclusions reached by the lower courts. To the extent a territorial court has the right to independently construe its own law, an appellate court does not infringe upon that right when it holds, as the Ninth Circuit did here, that the lower court misapplied *existing* legal precedent and reached a decision which the evidence will not support.[11] *See* App. A at 8a. As this Court ruled in *In re Sawyer*, 360 U.S. 622, 640 (1959), *De Castro* does not preclude a court of appeals overturning the decision of a territorial court if the lower court's decision is not supported by substantial evidence ("the question of the total insufficiency of the evidence to sustain a serious charge of professional misconduct . . . is not one which can be subsumed under the headings of local practice, customs or law").

Moreover, *De Castro* holds the decision of a territorial supreme court in a matter of local concern may be reversed if the territorial court's error is "clear or manifest" or the interpretation of law it adopted is "inescapably wrong" or "does violence to recognized principles of local law." *De Castro v. Board of Comm'rs*, 322 U.S. at 456, 458. The Ninth Circuit correctly concluded the decisions

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[11] The Ninth Circuit stated "the evidence does not support the lower courts' view that the agreement and warranty deed constituted a mortgage. . . . [¶] . . . [T]he lower courts have misapplied the test for whether a deed is a mortgage . . . . " App. A at 8a. The Ninth Circuit could just as easily have reached these conclusions if the present case had arisen as a diversity action from a District Court in California. The Ninth Circuit's conclusion that a California District Court misapplied California law would not raise any issues of federal dimension. Such issues are not raised here merely because the case originated in Guam.

reached by the lower courts were in direct and inescapable conflict with the case law on which the lower courts relied. The Ninth Circuit did not usurp the autonomy of the lower courts by so ruling.

3. *Guam v. Yang* Was In Any Event Properly Decided.

In *De Castro v. Board of Comm'rs*, 322 U.S. at 458-59, this Court ruled that to justify reversal by the First Circuit of a decision of the Puerto Rican Supreme Court on an issue of local law, the Puerto Rican Supreme Court's error must be "clear or manifest" or "inescapably wrong." The Court gave two reasons for its ruling.

First, Puerto Rico is a civil law jurisdiction with a system of laws imbued with Spanish traditions, and the Court reasoned federal judges are ill equipped to apply their common law training to resolving issues of statutory construction under civil law.[12] Second, Puerto Rico has an indigenous, non-federal court system. As the highest appellate court in that system, the Puerto Rican Supreme Court is entitled to the same deference which a federal court would accord a state Supreme Court in a diversity case. *Id.* at 458-59.

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[12] *See De Castro v. Board of Comm'rs*, 322 U.S. at 455 (Puerto Rico has a system of law "differing from our own in its origins and principles"; federal courts should not "superimpos[e] upon the Spanish law our common law preconceptions"); *id.* at 457 (deference owed " 'in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here' "); *id.* at 457 (Puerto Rican law "may appear strange or unorthodox in a common-law setting").

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The rationale for deferring to decisions of the Puerto Rican Supreme Court on issues of purely local concern does not apply to cases originating in Guam, for two reasons. First, in appeals from Guam, the federal courts are not called upon to interpret foreign laws pursuant to civil law principles. They are called upon to interpret California statutes in accordance with common law principles.[13]

Second, and perhaps more importantly, there is no local appellate court in Guam to which deference is owed. While the Organic Act of Guam provides the Guam legislature may, in its discretion, establish a local appellate court (48 U.S.C.A. § 1424-1(a) (1987)), it has not yet done

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As the Court subsequently explained in *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42, (1970), Puerto Rico

> is a Spanish-speaking Commonwealth with a set of laws still impregnated with the Spanish tradition. Federal courts, reversing Puerto Rico courts, were inclined to construe Puerto Rico laws in the Anglo-Saxon tradition which often left little room for the overtones of Spanish culture. Out of that experience grew a pronouncement by this Court that a Puerto Rico court should not be overruled on its construction of local law unless it could be said to be "inescapably wrong."

[13] The provisions of the Guam Civil Code which are involved in this case were adopted by the Naval Governor of Guam in 1933, before the Guam Legislature even acquired law-making powers. Hearings on S. 185, 81st Cong., 2nd Sess. (1950) before the Subcommittee of the Committee on Interior and Insular Affairs on April 19, 1950, at 65-66.

so. In the interim, appeals are heard by the District Court of Guam (48 U.S.C.A. § 1424(a) (1987), sitting as an appellate court in three-judge panels (48 U.S.C.A. § 1424-3(b) (1987)). The members of the three-judge panel are federal judges appointed by the President with the advice and consent of the Senate, and none is required to be a citizen of Guam.[14] Furthermore, the District Court is neither identified in the Organic Act as a "local court,"[15] nor treated as such by the citizens of Guam.[16]

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[14] The judge for the District Court of Guam, who acts as presiding judge of the appellate division, is appointed by the President with the advice and consent of the Senate for a ten-year term. 48 U.S.C.A. § 1424b(a). He has the same privileges and is subject to the same rules as are other district court judges. *See* 28 U.S.C.A. §§ 333, 460, 610 (1968). Prior to his appointment, there is no requirement that the judge for the District Court of Guam have had any contact with Guam. The other members of the appellate division are selected from a pool of judges assigned by the Chief Judge of the Ninth Circuit or the Chief Justice of this Court to sit on the District Court of Guam on a temporary basis. The judges assigned to these temporary positions can be chosen not only from local territorial courts but from any federal district court or court of appeals in the country. 48 U.S.C.A. § 1424-3(b) (1987); 48 U.S.C.A. § 1424b.

[15] The Act draws a distinction between the "local courts" of Guam and "the District Court of Guam." *See, e.g.*, 48 U.S.C.A. §§ 1424(a), 1424-1(b).

[16] In hearings on H.R. 4580, 94th Cong., 1st Sess. (1975) before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary on July 31, 1975, at 17, the following exchange occurred:

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Since the District Court of Guam is a federal court made up of federal judges, not an indigenous court made up of local judges, the Ninth Circuit correctly concluded no greater deference is owed the District Court's interpretation of Guam law than would be owed the interpretation of state law by any other district court in a

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> Mr. Kastenmeier. [I] [t]ake it as quite apart from the legal question involved, as a policy matter, the question is a popular issue. The Legislature of Guam and the people of Guam would prefer a judicial system by which access would be had to the superior court and then to the Supreme Court of Guam, without some form of preemption by the U.S. district court processes. Is that correct? Is that more or less the commonly held view, in terms of –
>
> Mr. Won Pat. [Representative in Congress from the Territory of Guam] That is the general feeling. I think the justice can speak on that.
>
> Judge Abbate [superior court judge, Territory of Guam] . . . . [¶] Presently, we have 18 cases pending before the Supreme Court, and attorney[s] are in a quandary, a dilemma, as to where to file their cases or notice of appeal, whether to go to the [Guam] Supreme Court [subsequently ruled invalidly constituted in *Guam v. Olsen*, 431 U.S. 195 (1977)], or to the appellate division of the district court.
>
> We are in wholehearted agreement with the bill as presented [which would authorize creation of a Guam Supreme Court]. We feel that . . . to allow us to have our own court system, and get away from this Federal intervention and Federal courts. I am sure they have enough work without handling any of the *Guam* cases.

diversity case.[17] While a district court's interpretation of state law naturally commands respect, "a party is entitled to meaningful review of that decision just as he is of any other legal question in the case . . . . " *See* 19 Charles A. Wright, Arthur K. Miller, & Edward H. Cooper, Federal Practice and Procedures § 4507, at 109-10 (and cases cited at note 61). No greater deference is owed because the issue of law was decided by a three-judge district court rather than a one-judge district court. *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) ("The correctness of the application of Younger [v. Harris, 401 U.S. 37 (1971)] on these facts by the [three-judge] District Court is for the Court of Appeals to determine"); *Socialist Workers Party v. March Fong Eu*, 591 F.2d 1252 (9th Cir. 1978); *Universal Amusement Co. v. Vance*, 587 F.2d 159 (5th Cir. 1978).

Hakubotan's contention that deference to Appellate Division decisions is mandated by 48 U.S.C.A. § 1424-2 is also not well taken. Petn. at 15-16. Section 1424-2 states:

> The relations between the courts established by the Constitution or the laws of the United States and the *local* courts of Guam with respect to appeals . . . shall be governed by the laws of the United States pertaining to the relations between the courts of the United States . . . and the courts of the several States . . . .

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[17] In *Saludes v. Ramos*, 744 F.2d 992, 994 (3rd Cir. 1984), the Third Circuit reached the same conclusion with respect to appeals from the Virgin Islands District Court, ruling deference was not owed to local interpretation of Virgin Islands law because "there is no separate, insular judicial system."

48 U.S.C.A. § 1424-2 (emphasis added). In *Matter of Alison*, 837 F.2d 619 (3rd Cir. 1988), the Third Circuit, construing identical language in the Organic Act of the Virgin Islands (48 U.S.C.A. § 1613), ruled the Virgin Islands statute had no effect until the Legislature of the Virgin Islands created local appellate courts. Similarly, while section 1424-2 may confer the status of state courts on local Guam appellate courts, when and if such courts are created, as yet no such courts exist. Section 1424-2 does not by default confer the status of a state court on the federal District Court of Guam.

4. The Ninth Circuit Did Not Misapply The "Clearly Erroneous" Standard of Review.

Hakubotan contends the Ninth Circuit engaged in impermissible fact-finding. There is no merit to this contention.

The Ninth Circuit did not rule in favor of Yasuda because it disagreed with the lower courts' findings of fact. There was no dispute in this case – indeed, it was expressly provided in the parties' loan extension agreement – that once legal title to the subject property changed hands, the parties' creditor-debtor relationship was permanently ended. The key issue on appeal was construing the legal *significance* of this fact, not revisiting the factual determinations of the lower court.[18] In ruling

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[18] Hakubotan claims the Ninth Circuit erred by resolving factual questions about the negotiations which led to the extension agreement. The events which led to the parties' agreement had no bearing on the court's analysis. In any event, the relevant facts are undisputed.

the deed Furusawa recorded could not permissibly be construed as a security device, the Ninth Circuit was simply following a line of California Supreme Court decisions dating back to 1894 which stand for the proposition that if there is no continuing creditor-debtor relationship after property changes hands, the deed which effects the transfer of title cannot, as a matter of law, be viewed as a mortgage. *See, e.g., Deming v. Smith*, 66 P.2d 454 (1937) (court affirms judgment on the pleadings on ground that facts, indistinguishable from those in the present case, were insufficient *as a matter of law* to support the conclusion that a deed was intended to operate as a mortgage).

The Ninth Circuit observed in passing that Hakubotan's position that the parties were really executing a mortgage and not a sales agreement was not logical, as indeed it is not.[19] The court's decision, however, was

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[19] When the parties negotiated an extension of the loan and executed the conditional sales contract, a mortgage was already in place, and its validity was unquestioned. It ascribes irrational behavior to the parties to hold, as the trial court did, that it was the parties' intention to simply execute another mortgage identical to the existing mortgage, except that it postponed by six months Yasuda's right to initiate foreclosure. Under the trial court's interpretation, Yasuda would not only get nothing by way of consideration from Hakubotan, it would actually end up with less than what it started with, i.e., a mortgage identical to the existing mortgage but with a due-date six months later. Hakubotan's contention Yasuda received consideration in the form of continued interest at the rate of 1.5% per month ignores the fact that the original promissory note specifically called for the continuing payment of interest at the rate of 1.5% per month following a default. Exh. A at 1. Clearly, when Yasuda agreed to waive its right to foreclose at

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based on undisputed evidence, not on the court's assessment of the parties' intentions.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

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the end of the initial loan period and granted Hakubotan six additional months to repay its loan, the parties must have had in mind that Yasuda would receive some consideration for the extension which it did not already have. What Yasuda received is exactly what the contract *states* it received, namely, the right to record the deed without the necessity of initiating formal foreclosure proceedings in the event Hakubotan defaulted during the six-month extension.

It was appropriate for the Ninth Circuit to comment on the logical implications of the parties' transaction. The trial court confessed that because of the poor quality of the translation in this case (the key witnesses spoke Japanese), the court could not make credibility determinations and "found it necessary to seek instead what would be the logical interpretation of the factually disputed transactions." App. C at 21a.